

NO. 32972

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

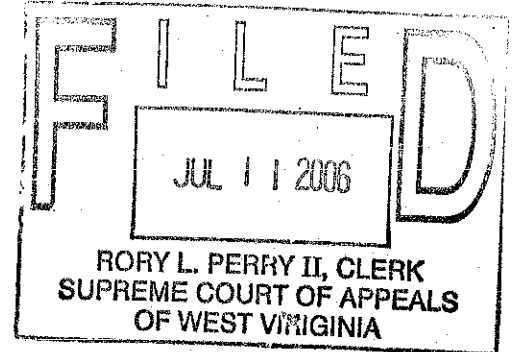
STATE OF WEST VIRGINIA, EX REL. HANLEY C. CLARK,
INSURANCE COMMISSIONER OF THE STATE OF WEST
VIRGINIA,

Applicant,

vs.

BLUE CROSS AND BLUE SHIELD OF WEST
VIRGINIA, INC.,

Respondent,



INTERNATIONAL UNION, UNITED MINE WORKERS OF
AMERICA,

Claimant and Intervenor

v.

RECEIVER OF BLUE CROSS AND BLUE
SHIELD OF WEST VIRGINIA, INC.

REPLY BRIEF OF APPELLANT UNITED MINE WORKERS OF AMERICA
TO BRIEFS OF INTERVENORS WEST VIRGINIA STATE MEDICAL
ASSOCIATION AND WEST VIRGINIA HOSPITAL ASSOCIATION

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 90-C-3825

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ARGUMENT

The United Mine Workers of America files this Reply Brief in response to the briefs filed by the Intervenor West Virginia Medical Association and West Virginia Hospital Association. The Intervenor essentially repeat the same arguments advanced by the Receiver throughout the 16-year history of this case. Those arguments have been largely addressed by the UMWA's initial brief and reply to the Receiver's brief. However, a further response is appropriate with respect to certain of the arguments offered by the Intervenor.

A. Former West Virginia Code §33-24-27 Does Not Preclude the Right of the UMWA To Recover Its Trust Property.

The Medical Association and Hospital Association argue that the UMWA is precluded from recovering its property because tracing funds in the hands of the Receiver to trust property is an equitable remedy barred by former West Virginia Code §33-24-27. That statute specifically sets out the classes of creditors and the priority of payment in liquidation proceedings and the language relied upon appears after the classification of claims, including late claims, and states that "[n]o claim by a policyholder or other creditor shall be permitted to circumvent the priority classes through the use of equitable remedies." It was clearly intended to prohibit creditors from using equitable doctrines such as substantial compliance to excuse failure to comply with the requirements for filing claims. It has been applied only to strictly enforce the filing requirements for claims where a creditor with late-filed claims attempted to move up in priority using the equitable doctrine of substantial compliance. State ex rel. Clark v. Blue Cross and Blue Shield of W. Va., 195 W.Va. 537, 466 S.E.2d 388 (1995).

This argument fails because the provision relied upon specifically refers to a “*claim by a policyholder or other creditor.*” The UMWA does not assert a claim, and is neither a policyholder nor a creditor. The UMWA has asserted since the very beginning of this case 16 years ago that it was the owner of trust property in the hands of Blue Cross and Blue Shield of West Virginia and the Receiver, and it has carefully reserved its right to litigate that issue from the outset. The UMWA was not a policyholder and did not extend a loan to BCBS. The only legal relationship between them regarding this dispute is that the UMWA was the owner and beneficiary of the trust and BCBS was the trustee. The language relied upon by the Intervenor does not apply by its own terms. The issue in this case is not one of priorities among creditors, but whether the property subject to the trust is property of the estate. If property which came into the hands of the Receiver was subject to the trust, it is not property of the estate and the UMWA is entitled to its return.

B. The General Creditors of BCBS-WV Do Not Occupy the Status of Bona Fide Purchasers With Respect to the UMWA Trust.

The Hospital Association contends that the UMWA’s trust cannot be asserted against the Receiver because the Receiver stands in the shoes of a bona fide purchaser for value. This was an argument raised by the Receiver earlier in the proceedings in this case, but never adopted by the Referee or the Circuit Court.

The Receiver previously argued that the UMWA trust does not prevail over the rights of the general creditors of BCBS-WV, whose rights as “innocent parties” have intervened. That assertion is incorrect. The right to follow trust property into its product, including a commingled fund, can only be defeated by the superior rights of a bona fide purchaser for value without notice. Marshall's Executor v. Hall, 42 W.Va. 641, 26 S.E. 300 (1896). A general creditor of the trustee does not have

that status. In Hogg v. McGuffin, 72 W.Va. 86, 77 S.E. 552 (1911), the Court rejected the argument that creditors of the trustee, even where they held liens on the assets of the trustee, could prevail over the superior claim of the beneficiary of the trust:

The funds were then in the form of notes payable to McGuffin [the trustee], in the hands of the bank for collection; they had not passed into the hands of an innocent holder for value, and out of Hogg's [the beneficiary] reach. The notes were still McGuffin's property, in the hands of the bank, at the time Hogg brought his suit ... Hogg's title to \$16,620 of the fund while only an equitable one was superior to McGuffin's, and being superior to the debtor's title, his creditors could acquire no liens against it. It is a familiar principle of law that the creditor can acquire no greater right in respect to debtor's property than the debtor himself has.

The Restatement, 2d, Trusts §308 states that a creditor of the trustee is not a bona fide purchaser:

A creditor of the trustee personally who attaches trust property or obtains and records a judgment against him or levies execution upon the trust property is not a bona fide purchaser although he has no notice of the trust.

Comment c. states:

Although by statute or otherwise a creditor who obtains a judgment is entitled to a lien upon land or other property of his judgment debtor, the judgment creditor is not a bona fide purchaser, and he cannot enforce such a lien upon property which the judgment debtor holds in trust.

Here, the treasury bond which the UMWA asserts was subject to the trust remained in the possession of the trustee and passed to the Receiver when the liquidation proceeding was filed. The Receiver acquired no right that property superior to the right which BCBS had as trustee. The treasury bond remained property subject to the UMWA trust, and may not be used to pay the trustee's creditors. The law is clear that creditors of the trustee do not have the status of a bona fide purchaser and that their claims are inferior to those of the beneficiary of the trust regardless of their notice or lack thereof of the existence of the trust.

C. The Expiration of the Trust Did Not Convert the Relationship Between the UMWA and BCBS to that of Debtor and Creditor

The Hospital Association echoes the argument of the Receiver that when the term of the trust expired, the relationship of owner and trustee was converted to one of creditor and debtor, and the trust corpus, by virtue of the failure of BCBS to return it in a timely fashion to the UMWA, became a loan. There is absolutely no shred of evidence in this case that there was any agreement by the parties to the trust agreement to convert the trust to a loan.

When the trust agreement expired, BCBS had no further active duties under the terms of the trust, but only an obligation to return the trust property to its owner. By virtue of the Statute of Uses, W.Va. Code §36-1-17, "the legal title to the same estate or interest which he had in the use of such property shall pass to and be legally deemed to be in the person for whose use or benefit or in trust for whom, the legal title to the property was so held." The effect of the termination of the trust was to vest both the legal and equitable title to the property in the beneficial owner of the trust, the UMWA. Rogerson v. Wheeling Dollar Savings & Trust, 159 W.Va. 376, 378, 222 S.E.2d 816, 819 (1976); Provident Life & Accident Ins. Co. v. Little, 88 F.Supp.2d 604 (S.D.W.Va. 2000); Restatement (3d) of Trusts, §6. Accordingly, prior to the institution of the liquidation proceeding, BCBS had no claim to the trust corpus, not even the bare legal title of a trustee. The Receiver acquired only those rights in the trust corpus which BCBS had, which is to say none whatsoever. In the absence of any evidence that there was an agreement to convert the trust into a loan, the expiration of the trust only strengthens the UMWA's claim to property which can be traced to the trust corpus.

D. Status of the Claims Against the BCBS Estate.

Both the Hospital Association and the Medical Association address the status of the claims in this case. The unpaid medical providers were classified in Class II along with policyholders, and previous received a distribution of 50% of the amount of their claims. The Receiver has estimated that if the Circuit Court's order is affirmed, the medical providers represented by the Intervenor may receive an additional 8% distribution on their claims, and that subscribers and the federal government would receive a 100% distribution (as opposed to 73% if the decision is reversed). Assuming those estimates to be reasonably accurate, the effect on the medical providers does not warrant taking trust property belonging to the UMWA, not BCBS, to enhance the recovery of the creditors of BCBS.¹

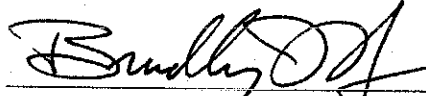
CONCLUSION

The UMWA was entitled to the return of property subject to its trust. The decision of the Circuit Court of Kanawha County should be reversed, and the Receiver should be required to pay over to the UMWA the value of the treasury bond with accrued interest, subject to an offset of the recovery in the directors and officers litigation against the original amount of the UMWA trust (\$1,088,148.13).²

¹It should be noted that the UMWA trust came from the paychecks and union dues of working UMWA members, and that the trust was established as part of an effort to provide low-cost health coverage to laid off members of the union.

²The UMWA disagrees with the position of the Hospital Association regarding the application of the offset for the UMWA's recovery in the litigation against the directors and officers of BCBS. That recovery represented damages for the failure of the directors and officers to preserve all the trust corpus (\$1,088,148.13) and should be offset from that amount, not from the value of the remaining portion of the trust corpus represented by the treasury bond at issue in this matter (\$901,902.47).

UNITED MINE WORKERS OF AMERICA,
Appellant, by Counsel



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See, Reply Brief of Appellant UMWA at p. 3.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of the Appellant United Mine Workers of America to the Briefs of the Intervenor West Virginia Hospital Association and West Virginia Medical Association was served on all parties in this matter by mailing a true copy thereof to their counsel of record in this matter, on July 10, 2006, as follows:

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